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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SKILSTAF, INC., on behalf of itself and all
others similarly situated,

Plaintiff,

v.

CVS CAREMARK CORP., LONGS DRUG
STORE CORPORATION, THE KROGER CO.,
NEW ALBERTSON'S, INC., RITE AID
CORPORATION, SAFEWAY, INC.,
SUPERVALU, INC., WALGREEN CO., AND
WAL-MART STORES, INC.,

Defendants.

Case No. CV 09-2514 SI
[Complaint Filed: June 5, 2009]

**SUPPLEMENTAL REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS BY
DEFENDANT THE KROGER CO.**

Date: January 15, 2010
Time: 9:00 a.m.
Dept: Courtroom 10, 19th Floor
Judge: The Hon. Susan B. Illston

1 **I. INTRODUCTION**

2 Skilstaf's Opposition¹ only further highlights the deficiencies in Skilstaf's allegations
 3 with respect to Kroger. Skilstaf does not dispute that Kroger is specifically mentioned only
 4 *once* in the Complaint—in the paragraph that identifies Kroger as a defendant. Nor does
 5 Skilstaf disagree that Kroger is not alleged to have participated in, or even to have known
 6 about, any wrongful conduct by others regarding AWP. Instead, Skilstaf's principal response
 7 to Kroger's Supplemental Memorandum is to point to six generic and conclusory "unjust
 8 enrichment" allegations that fall far short of providing the required well-pleaded facts that
 9 could plausibly give rise to a conclusion that Kroger was somehow enriched—unjustly—under
 10 any applicable state's law. While Skilstaf also quibbles about the applicable pleading standard,
 11 the Opposition confirms that Skilstaf's lengthy Complaint fails to meet even the most basic
 12 Rule 8(a)(2) pleading requirement for its purported "unjust enrichment/money had and
 13 received" claim against Kroger.²

14 **II. ARGUMENT**

15 The centerpiece of Skilstaf's Opposition is six bullet points containing excerpts of a
 16 handful of allegations that Skilstaf highlights as support for an unjust enrichment claim against
 17 Kroger. Opp. at 4-5. Of course, none of these allegations even mentions Kroger specifically.
 18 And while they are presumably the most compelling that Skilstaf has to offer with respect to
 19 Kroger, neither those allegations nor anything else in the 94-page, 348-paragraph Complaint
 20 suffice to state a claim against Kroger, for at least the following three reasons:

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 22 ¹ In addition to the abbreviations used in Kroger's Supplemental Memorandum of Points and
 23 Authorities in Support of Motion to Dismiss, filed September 11, 2009 ("Supplemental
 24 Memorandum" or "Supp. Mem."), "Opposition" or "Opp." refers to Plaintiff Skilstaf Inc.'s
 25 Response to Defendant The Kroger Company's Supplemental Memorandum in Support of
 26 Motion to Dismiss, filed November 13, 2009, and "Joint Reply Memorandum" refers to
 27 Defendants' Reply Memorandum in Support of Motion to Dismiss, filed concurrently.

28 ² The unjust enrichment claim—to the extent such a cause of action even exists under California
 29 law, *see, e.g.*, *GA Escrow, LLC v. Autonomy Corp. PLC*, 2008 WL 4848036, at *6-7 (N.D. Cal.
 30 2008) (J. Illston) (no cause of action in California for unjust enrichment)—also fails for the
 31 reasons set forth in the Joint Reply Memorandum. Kroger joins in all arguments in the Joint
 32 Reply Memorandum (except for those relating solely to Skilstaf's RICO claims, which are not
 33 asserted against Kroger). Kroger also joins in the arguments made in Walgreen Co.'s
 34 Supplemental Reply Memorandum.

1 First, most of the referenced allegations contend that “Defendants” received a “benefit”
 2 as a result of “inflated” payments. *See* Opp. at 4-5 (*citing* CM ¶¶ 337, 338, 339, 343). These
 3 generic “group” allegations fail for the reason mentioned in the Joint Memorandum (at 39-40)
 4 and the Reply Joint Memorandum (at 23-24): Skilstaf does not adequately allege that it
 5 actually made any supposedly inflated payment *to Kroger*. *See also* Supp. Mem. at 4. These
 6 generic allegations about benefit therefore are not “enough to raise a right to relief above the
 7 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In any event,
 8 even Skilstaf concedes that mere receipt of a benefit is not by itself sufficient under any
 9 applicable state’s unjust enrichment law. *See, e.g., Delino v. Platinum Community Bank*, 2009
 10 WL 2366513, at *8 (S.D. Cal. July 30, 2009).

11 Second, while Skilstaf repeats its allegation that it was “under a mistake of fact”
 12 regarding the accuracy of First Databank’s reporting of AWP, *see* Opp. at 4-5 (*citing* CM ¶¶
 13 338, 341), it literally ignores Kroger’s showing that this sort of “mistake” is not sufficient,
 14 where, as here, Skilstaf does not allege that Kroger knew of any misreporting by First
 15 Databank (or of any wrongful conduct by anyone), or of Skilstaf’s purported mistake. *See*
 16 Supp. Mem. at 4; *see also First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1664,
 17 1660-70 (1992) (plaintiff required to allege defendant’s knowledge of plaintiff’s purported
 18 mistake, and defendant’s knowledge that it was not entitled to retain loan proceeds, in order to
 19 state claim for unjust enrichment; with respect to a claimed unjust enrichment based upon
 20 another’s mistake, “innocent recipients may be treated differently than those persons who
 21 acquire a benefit with knowledge”). Skilstaf’s failure to respond on this point is telling.

22 Third, Skilstaf points to its conclusory allegation that any supposed benefit received by
 23 “defendants” is “unjust” or “inequitable.” *See* Opp. at 4-5 (*citing* CM ¶¶ 339, 343). Of course,
 24 the Court need not accept these naked legal conclusions, even where they are “couched as a
 25 factual allegation.” *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1950 (2009). Here, the
 26 Complaint lacks specific *factual* allegations sufficient to permit the Court to conclude that
 27 Kroger—who is not alleged to have known of or participated in any wrongdoing—has received
 28 any “unjust” benefit. *See generally* Walgreen Co.’s Supplemental Reply Memorandum.

1 At bottom, the allegations highlighted in Skilstaf's Opposition do not satisfy even the
 2 most basic Rule 8 pleading standard as against Kroger.³ See Supp. Mem. at 2-3 (citing cases);
 3 see also *Tietsworth v. Sears, Roebuck & Co.*, 2009 WL 3320486, at *14 (N.D. Cal. Oct. 13,
 4 2009) (recitation of the elements of unjust enrichment, without factual allegations connecting
 5 defendant to payments allegedly made by plaintiff, is insufficient).⁴ Indeed, none of the cases
 6 cited by plaintiff has allowed an unjust enrichment claim to proceed in circumstances even
 7 remotely comparable to those actually pleaded against Kroger here.

8 Accordingly, the complaint fails to state a claim for unjust enrichment against Kroger.⁵

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13 ³ Skilstaf argues that its allegations are not subject to Rule 9(b)'s heightened pleading standard.
 14 This is irrelevant because, as shown, Skilstaf's allegations against Kroger fail even the ordinary
 15 Rule 8 pleading requirements. Nevertheless, it is well-established that Rule 9(b) applies even to
 16 claims for which fraud is not an essential element if a plaintiff chooses to allege fraudulent
 17 conduct such that the claims "sound in fraud." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
 18 1103-1104 (9th Cir. 2003). This pleading rule applies to state law unjust enrichment claims. *In*
 19 *re Actimmune Marketing Litigation*, 2009 WL 3740648, at *6, *16 (N.D. Cal. Nov. 06, 2009)
 20 (unjust enrichment claim based on fraud must satisfy Rule 9(b) particularity requirements). The
 21 cases cited by Skilstaf are not to the contrary. For example, in *Wolk v. Green*, 516 F. Supp. 2d
 22 1121, 1133 (N.D. Cal. 2007), the Court did not apply Rule 9(b), but this is because the unjust
 23 enrichment claim there was premised upon allegations of legal malpractice, not on allegations of
 24 fraud or mistake. Moreover, Skilstaf's effort to avoid Rule 9(b) is flatly contrary to its (incorrect)
 25 contention that its unjust enrichment claim should be subject to a longer limitations period
 26 because it is "premised on" alleged fraudulent conduct. See Plaintiff's Opposition to Defendants'
 27 Motions to Dismiss at 27. Skilstaf cannot have it both ways.

28 ⁴ The cases cited by plaintiff do not hold to the contrary. Indeed, in one of them, *Ibarra v. Plaza*
 29 *Home Mortgage*, 2009 WL 2901637, at *8 (N.D. Cal. Sept. 4, 2009), the Court dismissed an
 30 unjust enrichment claim where plaintiff had failed to allege what benefit defendant had received
 31 or that defendant had engaged in any wrongdoing.

32 ⁵ To the extent that Alabama law applies, Skilstaf's claim against Kroger also fails under
 33 Alabama law. Alabama law permits an unjust enrichment claim where a defendant retains some
 34 benefit that "in equity and good conscience" belongs to the plaintiffs, or where a defendant holds
 35 some benefit that was improperly paid to defendants because of fraud or mistake. See *State Farm*
 36 *Fire & Cas. Co. v. Evans*, 956 So. 2d 390, 400 (Ala. 2006). Skilstaf's allegations make plain that
 37 its unjust enrichment theory is predicated on the latter theory—that Defendants benefited as a
 38 result of a purported (albeit inadequately pleaded) "fraudulent scheme" by others and Skilstaf's
 39 supposed mistake about it. See Opp. at 5. As a result, Skilstaf's reliance on cases in which fraud
 40 or mistake is not alleged as the basis for an unjust enrichment claim is inapposite. Furthermore,
 41 the Complaint fails to allege facts that could support a conclusion that equity or good conscience
 42 would require restitution from Kroger.

III. CONCLUSION

For the foregoing reasons, and the reasons stated in the Joint Memorandum and the Joint Reply Memorandum, Kroger respectfully requests that the claim asserted against it in Plaintiff's Class Action Complaint be dismissed.

Date: December 18, 2009

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By: _____ /s/
Laurence A. Weiss

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THE KROGER CO.